No. 300

In the Supreme Court of the United States

OCTOBER TERM, 1939

JERRY BRUNO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

INDEX

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OPINION BELOW

No opinion was rendered by the District Court. The opinion of the Circuit Court of Appeals (R. 417–421) has not yet been reported.

JURISDICTION

The judgment sought to be reviewed was entered July 20, 1939 (R. 422). The petition for a writ of certiorari was filed August 18, 1939. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the refusal of the trial court to charge that no presumption should be raised against petitioner, because of his failure to testify, constituted reversible error.

2. Whether there was a fatal variance between the conspiracy charged in the indictment and the proof at the trial.

3. Whether the admission in evidence of an intercepted intrastate telephone conversation was prejudicial error where it was used merely to corroborate the testimony of a witness.

STATUTES INVOLVED

The pertinent statutory provisions are set forth in the Appendix, *infra*, pp. 12–13.

STATEMENT

On December 6, 1937, the petitioner and 87 others were indicted for conspiring to import, sell, transport, and conceal narcotics (R. 7–16). The petitioner and 14 others were tried together, and on June 2, 1938, the petitioner and some of the others were convicted (R. 345). He was on the same day sentenced to two years' imprisonment and fined $5,000 (R. 5). The petitioner and another appealed to the Circuit Court of Appeals for the Second Circuit, where the judgment as to the petitioner was affirmed (R. 421).

The testimony of narcotic agents, informers, and some of the defendants who had pleaded guilty,

showed that one group of the conspirators, whom the court below described as "middlemen" (R. 417) secured the narcotics from a group of the conspirators who were smugglers (R. 75, 78, 122–133). The middlemen (R. 71, 72) sold the narcotics to two groups of the conspirators who were retailers—a local group, of which petitioner was one (R. 71), and another group which distributed the narcotics in Texas and Louisiana (R. 148–151, 154, 155). There is evidence that the petitioner shared in the profits (R. 49, 62) and was active in the business (R. 26, 30–31, 36–37, 48–49, 52, 110, 113).

ARGUMENT

I

The petitioner, citing U. S. C., Title 28, Section 632, *infra*, p. 13, first contends that the trial court committed reversible error in refusing to give the following charge requested by the petitioner (R. 345, 398, 407):

> The failure of any defendant to take the witness stand and testify in his own behalf, does not create any presumption against him; the jury is charged that it must not permit that fact to weigh in the slightest degree against any such defendant, nor should this fact enter into the discussion or deliberations of the jury in any manner.

We submit that the refusal to charge as requested was not prejudicial error. The court had

instructed the jury that a defendant is presumed innocent until proved guilty (R. 330); that the burden of proving guilt of a defendant beyond a reasonable doubt rests upon the Government and must be sustained throughout the trial (R. 330); and that (R. 332):

> It is the privilege of a defendant to testify as a witness if, and only when, he so elects; and when he does testify his credibility is to be determined in the light of his interest, which usually is greater than that of any other witness, and is therefore a matter which may seriously affect the credence that shall be given to his testimony.

Under these instructions the presumption of innocence could not be affected by the exercise of petitioner's right not to testify.

In the instant case, some of the defendants elected to testify while the petitioner and others did not. In view of this circumstance, it is at least doubtful whether the giving of the requested charge, thus emphasizing the fact that some of the defendants did not testify, might not have prejudiced, rather than benefited the petitioner, who had not taken the stand. Thus, in *Swenzel* v. *United States*, 22 F. (2d) 280 (C. C. A. 2d), one Bindel and one Swenzel were prosecuted for unlawfully manufacturing beer. Swenzel took the stand. Bindel did not. A charge similar to that in the instant case was given, but a requested charge that Bindel's failure to take

the stand did not create any presumption against him was refused. The court ruled (p. 282):

> Undoubtedly to say anything about the failure of a defendant to testify tends to keep that prejudicial consideration before the jury. If it is better, as this court has said, not to mention it unless requested, how can it be error not to deal with it, even if requested? * * * It is at least problematical whether mentioning Bindel's right not to take the stand would not have impressed upon the jury a comparison between him and Swenzel, when as matters stood Swenzel might have been regarded as covering the ground for both defendants, so that no further testimony was necessary.

It may be noted that, in other cases, defendants have contended that it is reversible error, in the absence of a request by the defendant, to instruct the jury that no presumption is to be drawn from the failure of the defendant to testify.[1] This contention was not sustained. However, the courts have said that, in the absence of a request by defendant, the better rule requires the court to be silent. *Becher* v. *United States*, 5 F. (2d) 45 (C. C. A. 2d), certiorari denied, 267 U. S. 602;

[1] *Hanish* v. *United States*, 227 Fed. 584 (C. C. A. 7th), certiorari denied, 239 U. S. 645; *Kreuzer* v. *United States*, 254 Fed. 34 (C. C. A. 8th), certiorari denied, 249 U. S. 603; *Robilio* v. *United States*, 259 Fed. 101 (C. C. A. 6th); *Becher* v. *United States*, 5 F. (2d) 45 (C. C. A. 2d), certiorari denied, 267 U. S. 602. See also, *Nobile* v. *United States*, 284 Fed. 253 (C. C. A. 3d).

Kahn v. *United States*, 20 F. (2d) 782 (C. C. A. 6th). If the defendant's rights are better protected by silence in such a situation, then it is difficult to see how a mere request by the defendant to give the instruction can convert silence into prejudicial error. The rule that the defendant's rights are best protected by silence remains, and this is not changed by a request to instruct. Error, to require reversal, must be substantial (Sec. 269, Judicial Code, as amended, U. S. C., Title 28, Sec. 391), and the Federal courts will not presume prejudice where there is no likelihood that the refusal of a requested instruction could have wronged the accused. *Linn* v. *United States*, 251 Fed. 476 (C. C. A. 2d); *Kalmanson* v. *United States*, 287 Fed. 71 (C. C. A. 2d), certiorari denied, 261 U. S. 616.

In the cases cited by the petitioner (*Wilson* v. *United States*, 149 U. S. 60; *McKnight* v. *United States*, 115 Fed. 972 (C. C. A. 6th); and *Hersh* v. *United States*, 68 F. (2d) 799 (C. C. A. 9th), there were additional circumstances which, in conjunction with the refusal to charge as requested, constituted reversible error. In those cases attention was called, either by the judge or by the prosecutor, to the defendant's failure to testify or produce documents. No such situation is presented here. The court, in the instant case, made no comment on the petitioner's failure to testify.

For these reasons, we submit that the ruling of the court below was correct, and that it adequately

disposed of the petitioner's contention when it said (R. 420):

> * * * The important thing to bear in mind is the probable futility of the instruction. * * * the real protection, and the only practical protection, is in preventing the prosecution from using it [defendant's failure to testify] as the basis of an inference of guilt. That is indeed a very real protection, for the prosecution's freedom would be a very deadly weapon; but the advantage derivable from an admonition by the judge that the jury shall make no such inference is wholly illusory; and only serves to put before them what will generally harm the accused, if it does anything at all.

II

The petitioner next contends that there was a fatal variance between the indictment and the proof. He argues that there were four distinct groups of conspirators, and that, therefore, four conspiracies were proved, whereas the indictment charged one general conspiracy to import, sell, transport, and conceal.

While it is quite possible for the importers to have conspired among themselves, the middlemen among themselves, and the retailers among themselves, it does not follow that there was not a general conspiracy with a common purpose to import and distribute narcotics. Such a conspiracy is charged in the indictment (R. 7–16). There was evidence from which the jury could and did find

that it existed: Ruppolo, a defendant who testified for the Government, and who was a middleman, was a partner of one Ignaro and others (R. 73). Ignaro, with the knowledge of Ruppolo, made the arrangements with the smugglers, Caputo and others (R. 78, 79). Ruppolo assisted in delivering narcotics to one Gentile (R. 80), the distributor to the southwest (R. 86, 89, 93), and to local retailers (R. 73). The petitioner was one of the local retailers (R. 71). Sometimes the receivers dealt directly with Gentile (R. 93) or with one Mauro (R. 35), partner of the petitioner (R. 49). This, and other evidence, shows a course of dealing in which the groups, though possible to be distinguished because of the parts they played, were nevertheless closely connected in the common enterprise. The common unlawful purpose, the establishment of a system of drug supply from steamship to addict, was established. This was recognized by the court below, which said (R. 418):

> * * * the conspirators at one end of the chain knew that the unlawful business would not, and could not, stop with their buyers; and those at the other end knew that it had not begun with their sellers. That being true, a jury might have found that all the accused were embarked upon a venture, in all parts of which each was a participant and an abettor in the sense that the success of that part with which he was immediately concerned, was dependent upon the success of the whole.

It is settled that conspirators who are actuated by a common and understood purpose, though falling among themselves into distinct groups, may be prosecuted as participating in one general conspiracy. *Short* v. *United States*, 91 F. (2d) 614 (C. C. A. 4th); *Allen* v. *United States*, 4 F. (2d) 688 (C. C. A. 7th); *United States* v. *De Vasto*, 52 F. (2d) 26 (C. C. A. 2d); *Wyatt* v. *United States*, 23 F. (2d) 791 (C. C. A. 3d), certiorari denied, 277 U. S. 588; *Jezewski* v. *United States*, 13 F. (2d) 599 (C. C. A. 6th).

Petitioner relies upon *United States* v. *Katz*, 271 U. S. 354, and *United States* v. *Peoni*, 100 F. (2d) 401 (C. C. A. 2d). These cases hold either that an isolated sale by one person to another does not create a conspiracy to sell, or that a vendor who has no interest in the resale by his purchaser is not a conspirator with the second purchaser. Here each of the successive conspiring purchasers bought for resale, with knowledge on the part of the successive vendors that such resale was intended, as the drugs moved along a single channel of distribution.

The petitioner was without question a member of the conspiracy to buy, conceal, and sell narcotics. He is not prejudiced if the charge be that of a conspiracy including these objects, and also that of importing. The question is not whether there has been any variance in proof, but whether there has been such a variance as to affect the substantial right of the accused. *Berger* v. *United States*, 295

U. S. 78. Under the facts of this case, we submit, there has been no prejudice to the rights of the petitioner.

III

The petitioner finally contends that the trial court committed reversible error in admitting into evidence a single intercepted intrastate telephone communication. He asserts that under Section 605 of the Federal Communications Act of 1934 (*infra*, p. 12) and the decision of this Court in *Nardone* v. *United States*, 302 U. S. 379, intercepted intrastate, as well as interstate, communications are inadmissible in a Federal Court.

It is unnecessary to determine in this case whether Section 605 applies to intrastate telephone communications, since it is clear, we submit, that the admission of the intercepted communication, even if error, did not prejudice the rights of the petitioner. The telephone conversation (R. 360) was intercepted when one La Rose, a codefendant, made a call from the hotel room of narcotic agent Esch (R. 26, 360). Another narcotic agent, Groff, had installed a dictograph in the room as well as a tap on the telephone (R. 143–145). Agent Esch, who was present when the call was made, testified as to what he heard (R. 26–27). All that appears from the intercepted conversation, which was listened to and noted by Agent Groff, was an inquiry if "Jerry" was "there, on Broome Street," the response, and greetings (R. 360). The remain-

der of the conversation was in Italian and was not understood by either of the agents (R. 27, 146) nor was it translated in court (Govt. Ex. 25; R. 360). The intercepted conversation was merely corroborative of the testimony of Agent Esch that La Rose had called the petitioner, Jerry Bruno, and that they talked in Italian.

It therefore seems plain that the court below was clearly right in holding that the admission in the instant case of the intercepted telephone conversation, if error, was not of such a prejudicial character as to require a reversal of the conviction of the petitioner (R. 419). *United States* v. *Reed*, 96 F. (2d) 785 (C. C. A. 2d), certiorari denied, 305 U. S. 612; Section 269, Judicial Code (U. S. C., Title 28, Sec. 391).

CONCLUSION

The case was correctly decided by the Circuit Court of Appeals. There is presented no question of general importance and no conflict of decisions. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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SEPTEMBER 1939.

APPENDIX

U. S. C., Title 47, Section 605, provides:

No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers, of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpoena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any commnication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such

information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto. * * *

U. S. C., Title 28, Section 632, provides:

In the trial of all indictments, informations, complaints, and other proceedings against persons charged with the commission of crimes, offenses, and misdemeanors, in the United States courts, Territorial courts, and courts martial, and courts of inquiry, in any State or Territory, including the District of Columbia, the person so charged shall, at his own request but not otherwise, be a competent witness. And his failure to make such request shall not create any presumption against him. (Mar. 16, 1878, c. 37, 20 Stat. 30.)

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